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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Mono)

GAIL ELIZABETH STEVENS, as Trustee, etc., et
al.,

Plaintiffs, Cross-defendants and
Respondents,

v.

RICHARD DOUGLAS AMOS, as Trustee, etc.,

Defendant, Cross-complainant and
Appellant.

C081577

(Super. Ct. No. CV130100)

This is an unusual easement dispute involving, inter alia, the right to enter another's land for the purpose of diverting a natural stream—a creek—for part of the year. Also at issue are two more traditional easement claims to a path across parcels for access purposes, and an easement for vehicle parking purposes. The litigants in the creek diversion dispute are appellant Richard Douglas Amos who owns land across which the creek flows and respondents Gail Elizabeth and Ross Jeffrey Stevens (Stevens) who own

an RV park on an adjacent parcel who claim a right of access to Amos's property for the purpose of diverting the creek onto the RV park during part of the year. The creek had historically been diverted in that manner. A portion of Amos's property adjacent to the RV park's parking lot was used by the RV park to accommodate large RV's with a wide turning range. The property's use for such purposes since 1984 underlies the second easement claim. Respondents Richard and Diane L. Paetz (Paetz) and Stevens also each claim an easement across a strip of land on Amos's property used to access their respective properties.

Stevens and Paetz filed a complaint to quiet title to the four claimed prescriptive easements and for declaratory relief to establish the easements over portions of Amos's land. Amos filed a counterclaim for trespass. Following a court trial, the trial court found in favor of Stevens and Paetz, establishing all four easements and denying Amos's trespass claim. Amos appeals, arguing Stevens was required to obtain a permit to divert water and Stevens and Paetz were required to establish adverse possession. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Creek Easement

At the center of the controversy is the California Creek, a small stream that originates on a hill across Highway 395 from the properties in question and flows easterly from there to Topaz Lake, a holding reservoir that provides recreational use and agricultural benefit, located on the other side of the highway. The water rights in the creek are owned by the Walker River Irrigation District.

Over the years, the creek has been diverted on both sides of the highway. Early on, creek water was diverted at the top of the hill on the west side of Highway 395 to allow its use by employees of an inspection station and by forest rangers stationed nearby. The water would then enter a culvert under the highway and come out on the

east side, fanning out into finger streams, crossing unimproved property, now owned by Amos, and an RV park, now owned by Stevens, until it reached Topaz Lake. However, that diversion ceased during the winter months when the inspection and ranger stations were closed. Around 1964 a culvert was installed to prevent the creek from flooding the highway during the winter months. The water then ran under the highway at a point near the south end of the RV park and into Topaz Lake. The creek returned to its former path during the spring, summer, and fall, fanning out into finger streams once again across the property now owned by Amos and Stevens.

In 1965 the owners of the RV park created a channel that directed creek water through a single creek bed during the spring, summer, and fall, so that it no longer fanned out, but instead created waterfalls and a stream running through the RV park before entering Topaz Lake. Thus from 1965 to the present, the creek has flowed through the RV park and directly into Topaz Lake from March through November. This benefitted the RV park with a scenic stream but also channeled the water in a manner that allowed the water to reach Topaz Lake rather than dissipating before reaching the lake.

In 1987 the ranger and inspection stations were permanently closed and the winter diversion (through the culvert installed in 1964) ceased. However, the Walker River Irrigation District and the Department of Food and Agriculture gave official permission to Stevens, the owner of the RV Park since 1984, to channel the creek through the RV park. During the winter months, Stevens allowed the creek to flow directly from the culvert to the lake.

The unimproved parcel of land adjacent to the southern portion of the RV park was purchased by Amos in 2004. The creek flows in a straight line from the highway to the lake during the winter over Amos's property. But, as noted, during the park's busy recreation season concrete, pipe, and sandbags have been erected on the property since 1965 to direct the flow into a single channel through the RV park. The Walker River Irrigation District has acquiesced in the seasonal diversion for over thirty years. Any

changes in the creek flow would require approval from the irrigation district, owner of the water. Stevens has been maintaining the current locations of the creek flow since 1987.

RV Parking Lot Easement

Part of the RV park parking lot sits on Amos's property. The parking lot was established by the previous owners of the RV park. Stevens maintained the parking lot from the time they purchased the business in 1984. In 2001 Stevens turned maintenance over to their daughter Julie and son-in-law David Hurley, who continue to maintain it. The parking area in question is used by large RV's with a wide turning range.

The Path Easement

Both Stevens and Paetz asserted a prescriptive easement to a strip of land on Amos's property used as access to their respective properties. Both Stevens and Paetz and their predecessors in interest used the path for more than the five years required to establish a prescriptive easement.

Paetz's Easement

In addition to the path easement, Paetz asserted an easement over Amos's property that contained a portion of the Paetz's driveway. Paetz used this portion of the driveway, built in 2006, since at least 2010.

Amos's Perspective

Amos purchased the subject property in 2004 with the intent to eventually develop the land, build a house, and landscape. Amos also planned to make aesthetic use of the creek running through the property. Without the insertion of sandbags, the creek flows over the property.

In 2006 Amos learned that Stevens came onto his property to place sandbags, which diverted the creek through a culvert and onto Stevens's property. That same year, Amos observed the RV park customers parking their vehicles partly on Amos's property.

The RV park customers also crossed over Amos's property going to and from the park. The trailers hindered Amos's ability to add plants and a fence to his property.

Amos discussed the creek diversion and parking issue with Stevens's representatives several times since the spring of 2006. That spring, Amos gave Stevens temporary, limited permission to divert the creek and to continue to park RV's on his property until Amos was ready to develop the property. The permissive use of the creek and parking coincided with the seasonal operation of the RV park since the creek was diverted back over Amos's property during the winter.

In 2013 Amos revoked permission for the creek diversion and the RV parking. Stevens and Paetz filed suit and Amos posted no trespassing signs.

Litigation

In September 2013 Stevens and Paetz filed an action against Amos to quiet title to prescriptive easements and for declaratory relief regarding a seasonal creek diversion, a portion of Amos's land used for parking vehicles at Stevens's RV park, a portion of Amos's property used as a driveway, and a path traversing Amos's land between the RV park and Paetz's property. Paetz joined the pathway claim and asserted a claim to the driveway easement. Amos brought a counterclaim against Stevens and Paetz for injunctive relief and trespass.

Following a court trial, the trial court found all four easements established and Amos's claim of trespass defeated by the establishment of the respective easements. The court determined Amos failed to satisfy his burden of proof that the use was permissive, and there was no substantial evidence of hostility on Stevens's part for the mistake exception to apply. Nor did the court find the facts before it implicated Water Code requirements asserted by Amos. According to the court, Stevens was not "asserting rights involving the use or appropriation of the creek water," but to enter Amos's

property “to assure that California Creek efficiently flows directly through their property and into Topaz Lake.”

Following entry of judgment, Amos filed a timely notice of appeal.

DISCUSSION

Creek Easement and State Water Code Requirements

Amos argues that since his land is contiguous to a state watercourse, he is a riparian user. Therefore, under the riparian doctrine, Amos has the right to reasonable and beneficial use of the water on his land, even if only aesthetic. Stevens are nonriparian users, since the creek does not naturally flow over their property. In order to divert water, a nonriparian user must obtain a permit from the State Water Resources Control Board and cannot obtain water rights through prescription. Therefore, the trial court erred in finding the Water Code requirements did not apply.

The trial court rejected Amos’s contention that both case law and the Water Code required Stevens to obtain a permit from the State Water Resources Control Board in order to obtain a prescriptive easement to the area of the creek on Amos’s property. According to the court, “Plaintiffs are not asserting rights involving the use or appropriation of the creek water. To the contrary the easement is to enter Defendant’s property to do work to assure that California Creek efficiently flows directly through their property and into Topaz Lake; clearly a beneficial use with the approval of the creek water’s owner, [Walker River Irrigation District]. The situation is distinguishable from authorities relied upon by Defendant.” As the trial court noted, the Walker River Irrigation District, owner of the creek water, gave permission for Stevens’s diversion in 1987.

We find no fault with the trial court’s reasoning. The Walker River Irrigation District has the right to fully appropriate all the water from the California Creek for the beneficial uses of irrigation and domestic uses. Nor was the water in question diverted:

“The terms ‘divert’ or ‘diversion’ as used in California water law have always applied to the *taking* of water from a stream or river, and not the mere blocking or altering the courts of the stream or river itself.” (*Siskiyou County Farm Bureau v. Department of Fish & Wildlife* (2015) 237 Cal.App.4th 411, 436.)

Prescriptive Easements

Prescription requires that adverse use be open, notorious, continuous, and adverse for at least five years. (Civ. Code, § 1007, Code of Civ. Proc., § 319.) The requirement of adverse or hostile use can be overcome by a showing that the use was permissive. (*Applegate v. Ota* (1983) 146 Cal.App.3d 702, 709.) Amos argues the trial court erred in finding five years of continuous and uninterrupted hostile use of the easements for the creek diversion, parking, and path.

Amos contends that, in 2006, he gave Stevens temporary, limited permission to divert the creek and continue to park the RV’s until Amos was ready to develop the property. If the elements granting a prescriptive easement are met, the burden of proof shifts to the defendant to demonstrate the use was permissive. (*Chapman v. Sky L’Onda etc. Water Co.* (1945) 69 Cal.App.2d 667, 680.)

Here, the trial court considered Amos’s testimony that, after he purchased the property in 2004, at some point he told Stevens that the creek diversion was “okay until I developed the property.” However, Amos was uncertain as to when the statement was made or if it was made more than once. Stevens denied any such discussion and stated they rarely saw or spoke with Amos from 2005 until the filing of the lawsuit. The court characterized Amos’s testimony as not only vague but controverted and found he failed to meet his burden of showing the use was permissive. The evidence supports the trial court’s conclusion and we find no error.

Amos also argues the prescriptive easements for the creek diversion and the RV parking fail under the mistake exception. We disagree.

Hostile possession may be established when the occupancy or use occurred though a mistake. An exception exists “where the possessor does not claim that his fences mark the true line but intends to move them to the true line when it is discovered. It was pointed out that in such cases the possessor is not claiming adversely.” (*Gilardi v. Hallam* (1980) 30 Cal.3d 317, 322.)

In a deposition taken prior to his death in 2014, Ross Stevens stated he believed that the creek diversion was on his property, not Amos’s. The trial court reviewed the testimony and found “there is no substantial evidence presented that the ‘possessor (Stevens) recognized the potential claim of the record owner and expressly or impliedly reflected intent to not claim the occupied land if record title was in another.’ *Gilardi v. Hallam*[, *supra*,] 30 Cal.3d [at p.] 324. To find no hostility requirements without the necessary substantial evidence ‘would emasculate the mistake rule.’ *Gilardi*, *supra* at p. 324.” We agree. The testimony Amos cites does not indicate Ross Stevens would have ceased use of the prescriptive easements if he had known they were on Amos’s property.

The trial court correctly concluded that the RV park easement, the path easements, and the Paetz driveway easement had been open, notorious, continuous, and adverse for over the required five years.

Adverse Possession

Finally, Amos argues the granting of an easement equivalent to an estate in land requires that the claimant meet all the requirements of adverse possession. According to Amos, the granting of a prescriptive easement is tantamount to an exclusive easement on the use of the creek; the parking easement prevents Amos from landscaping, fencing, or any other act of ownership; and the path easement prevents Amos from building on the property. Since Stevens and Paetz did not claim adverse possession the court erred in finding prescriptive easements.

In support, Amos cites *Raab v Casper* (1975) 51 Cal.App.3d 866, 876-877 (*Raab*). *Raab* distinguished prescriptive easements from adverse possession: “There is a difference between a prescriptive use of land culminating in an easement (i.e., an incorporeal interest) and adverse possession which creates a change in title or ownership (i.e., a corporeal interest); the former deals with the use of land, the other with possession; although the elements of each are similar, the requirements of proof are materially different. [Citations.] [¶] As the difference between prescriptive use and adverse possession is sometimes obscure, so is the difference between an exclusive easement and outright title. The former is a right to use property of another; every incident of ownership not inconsistent with enjoyment of the easement is reserved to the owner of the servient tenement; the latter may make use of any of the property which does not unduly interfere with the easement. [Citation.] An exclusive interest labeled ‘easement’ may be so comprehensive as to supply the equivalent of an estate, i.e., ownership. In determining whether a conveyance creates an easement or estate, it is important to observe the extent to which the conveyance limits the uses available to the grantor; an estate entitles the owner to the exclusive occupation of a portion of the earth’s surface. [Citations.]” (*Id.* at pp. 876-877.)

In *Raab*, the defendant built a cabin on the plaintiff’s land, even though the defendant was put on notice the cabin encroached on the plaintiff’s property. (*Rabb, supra*, 51 Cal.App.3d at pp. 870-871.) The court determined the cabin was not on a prescriptive easement since the plaintiff could not enter the cabin or take any possession of it. (*Id.* at p. 877.)

Here, none of the prescriptive easements found by the trial court conveys exclusive use to Stevens or Paetz. The creek easement only allows Stevens to enter Amos’s property twice a year to adjust the sandbags adjacent to the creek. The RV parking easement only allows Stevens’s use of a section of the property for parking during part of the year when the facility is open. The path easement allows Stevens and

Paetz access, but does not prevent Amos from using the same path. Nor does Paetz's driveway easement interfere with Amos's access to his property. As the trial court found, *Raab* is not "relevant to this discussion where [the] Defendants built a cabin entirely on [the] Plaintiff's land and the issue of one of lack of good faith by the defendants. Such is not the case with Mr. Paetz's driveway."

The trial court concluded "these easements establish a right to use [Amos's] property while every incident of ownership not inconsistent with enjoyment of each respective easement remains reserved to [Amos] as servient tenant who may make use of any of the subject property which does not unduly interfere with each easement." We find no error in the trial court's reasoning.

DISPOSITION

The judgment is affirmed. Stevens and Paetz shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

RAYE, P. J.

We concur:

HULL, J.

ROBIE, J.